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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

OHIO WATER SERVICE COMPANY,
Petitioner,

vs.

THE MAHONING VALLEY SANITARY DISTRICT,
Respondent.

(Two Cases)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

To the Honorable Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio

entered in the above-entitled cases (consolidated for hearing)[1] on March 31, 1954.

OPINIONS BELOW.

The opinion of the Ohio Supreme Court in this case is reported at 161 O. S. 259, and is set forth at page 68a. The opinion of the Ohio Court of Appeals is set forth at page 58a. The opinion of the trial court, which was a special statutory common pleas court having jurisdiction over The Mahoning Valley Sanitary District, is set forth at page 9a.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on March 31, 1954. Application for rehearing, filed pursuant to the rules of the Supreme Court of Ohio, was denied without opinion on April 21, 1954.

The jurisdiction of this court is invoked under Title 28 USC Sections 1257 and 2101.

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[1] Both cases Nos. 33688 and 33689 on the docket of the Ohio Supreme Court involve the same questions of facts and law and have been treated as consolidated cases in every court which considered them. They are maintained as separate cases because No. 33688 is an appeal from a final order entered by the special common pleas court on September 29, 1952, approving and confirming the Board of Appraisers' report, and No. 33689 is an appeal from a final order entered on March 19, 1953, after the first order had purportedly been vacated by that court. Since the cases are in every other pertinent aspect identical and since the question of vacation of the first order and entry of the second order is not at issue here, petitioner has prepared this petition and the accompanying appendix as though only a single cause were presented.

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QUESTIONS PRESENTED.

Two questions are presented:

1. Whether petitioner has been denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by certain sections of the Ohio Sanitary District Act which, as construed by the Supreme Court of Ohio, prohibit an appeal by petitioner from a judgment of the trial court which subjects petitioner's property to a proposed sanitary-district assessment, but specifically allow an appeal by the officials of the sanitary district from such judgment?

2. Whether the assessment of the total cost of a public improvement against only a portion of the property which the trial court recognized would be benefited thereby, in violation of a clear statutory mandate that all property benefited be assessed in proportion to the benefit received, deprives petitioner, a property owner who is thus assessed, of its property without just compensation and is a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The federal constitutional provision involved in this petition is as follows:

Amendment XIV.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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A portion of Article IV, Section 2 of the Constitution of Ohio is involved in this petition and is set forth at page 94a.

Statutes involved in this petition are as follows: Ohio General Code Sections 6602-41, 6602-58, 6602-60, 6602-64, 6602-65, 6602-69, 6602-70, 6602-77 and 12223-29.[2]

These sections being lengthy, are set forth in full beginning at page 94a.

STATEMENT OF THE CASE.

Petitioner is the owner of real property situated within the boundaries of The Mahoning Valley Sanitary District, the respondent herein. Respondent is a sanitary district formed under the Sanitary District Act of Ohio and consists geographically of the areas within the territorial limits of the cities of Youngstown and Niles, Ohio.

The Mahoning Valley Sanitary District (hereinafter called simply the "District") was organized for the purpose of supplying water to the cities of Youngstown and Niles and still sells all of its water to them. Such supply of water has been and is now in excess of the amounts needed to supply the needs of these cities and for many years these cities have been reselling to suburban townships and communities a substantial portion of the water which they receive from the District. (91a, 92a) This re-

[2] The General Code of Ohio was repealed and replaced by the Revised Code of Ohio effective October 1, 1953. This re-enactment of the Ohio statutes was not intended to change the law as set forth in the General Code, but only to recodify it. Since this cause arose during the time when the General Code was in force and since the pleadings and opinions in the lower courts refer to that code, such reference has been continued throughout this petition. Cross reference is made in the appendix between all General Code and Revised Code section numbers here involved.

sale of water to outlying areas has been a major contributing cause of the exhaustion of the District's former water surplus.

Realizing that these outlying areas were dependent upon the District's facilities for their water supply, the District, in 1949, decided to undertake a six million dollar expansion program, which will greatly increase the supply of available water. This litigation arose over the question of whether such benefited outlying areas should be assessed to pay the cost of such improvement in proportion to the special benefits received by them.

Pursuant to the provisions of the Sanitary District Act, the board of directors of a district, by whom it is managed and administered, determines the need for additional facilities and the probable cost thereof. (Ohio General Code Sec. 6602-69, p. 97a) The act further provides that such cost is to be assessed by the board of directors against all real property which will benefit from such facilities, whether within or without the district, on the basis of an appraisal of benefits prepared by appraisers and confirmed by a special common pleas court (Ohio General Code Sec. 6602-77, p. 100a) which is invested with jurisdiction, judicial and otherwise, over matters pertaining to the district. If any property owner is dissatisfied with the appraisal of benefits to his land, he may file written exceptions thereto (Ohio General Code Sec. 6602-64, p. 96a) which are heard and determined by this special court in connection with its consideration of the appraisal of benefits. (Ohio General Code Sec. 6602-65, p. 97a)

In this cause, notwithstanding the direct and unambiguous statutory requirements that the benefits accruing to lands outside the District must be appraised for assessment purposes (Ohio General Code Sec. 6602-60, p. 96a), the ap-

praisers, although conceding that such lands were benefited (2a), refused to appraise them and recommended that the entire cost of the proposed improvement be assessed against the property located within the District. (2a) Petitioner, and certain other property owners, filed timely exceptions to the appraisers' report (5a), on the ground that, by statute (Ohio General Code. Sec. 6602-60, p. 96a), lands outside the District, having a tax valuation of seventy million dollars (93a), which would benefit greatly from construction of the additional facilities, must be appraised so that they might be assessed for their fair shares of the cost of the improvement. At a hearing before the special common pleas court, petitioner argued that approval of the arbitrary action of the appraisers would result in an unconstitutional taking of property without due process of law and would be a denial of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution to the United States. The trial court overruled petitioner's exceptions (16a, 17a, 41a), refused to order the board of appraisers' report amended so as to conform to the provisions of the Sanitary District Act and the United States Constitution, and approved the report. (20a, 21a, 34a, 44a)

Petitioner duly filed a motion for new trial (28a), in conformance with the Ohio practice, in which it again raised the federal question referred to in the paragraph above. In support of its motion, and in compliance with the rules of practice of the trial court, a brief was filed with the motion (30a), wherein petitioner argued that the court's decision violated the Fourteenth Amendment to the Federal Constitution. (33a) Petitioner's motion for new trial was overruled (35a) and, by that act, the trial court necessarily considered and ruled on the federal question raised therein.

An appeal was taken to the Court of Appeals of Mahoning County (55a), one of the errors assigned being the above-mentioned federal question. (56a, 58a) After argument on the merits, the appellate court dismissed petitioner's appeal on the ground that no right of appeal existed from the decision of the trial court. (60a, 61a)

Petitioner then filed an appeal as of right before the Ohio Supreme Court (62a), assigning as one of the errors in the court below that petitioner had been denied due process of law and equal protection of the law (65a, 67a), as guaranteed by the Fourteenth Amendment to the Federal Constitution. While the assignments of error did not make specific reference to the Fourteenth Amendment, the words thereof were used, such words are not used in the Ohio Constitution, and an assignment so worded before the Supreme Court of Ohio has been held sufficient to raise a federal question under the Fourteenth Amendment so as to permit review by this honorable court. **Copperweld Steel Company v. Industrial Commission of Ohio**, 324 US 780, 89 L ed 1363, 65 S Ct 1006 (1945). In accordance with Ohio practice, a motion praying that the Supreme Court have certified to it the record of the court of appeals was filed simultaneously. (63a) The Supreme Court of Ohio sustained the motion to certify (88a), but dismissed the appeal as of right on the ground that no debatable constitutional question was involved. (90a) By such dismissal, the Supreme Court of necessity considered both the federal and the state constitutional questions, in accordance with the requirements of the Constitution (94a) and statutes (Ohio General Code Sec. 12223-29, p. 100a) of the State of Ohio. After extensive briefs were filed and oral argument was had, the Supreme Court affirmed the decision of the court of appeals (90a), holding, in a novel and sur-

prising decision, that while neither petitioner nor any other property owner could appeal from the decision of the trial court, the board of directors of the District had a right of appeal from **any** order of such court because of a specific grant contained in the Sanitary District Act. (77a)

This decision created an additional federal question as to whether the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States was denied petitioner by the grant of a unilateral right of appeal to the District, through its board of directors, while denying such right of appeal to all other affected persons. Since the holding by the Supreme Court was not based on arguments presented to it by either petitioner or the District, who were the parties to this cause, and since such holding could not in any way have been anticipated from any prior decision of the courts of Ohio or the federal courts, petitioner was first able to raise such federal question by filing an application for rehearing of this cause on that specific point before the Supreme Court of Ohio (78a) within the time permitted by its rules of practice. Petitioner's application set out in detail the federal question involved. The Supreme Court of Ohio denied petitioner's application without granting a hearing thereon. (91a)

REASONS FOR GRANTING THE WRIT.

The Supreme Court of Ohio, in its decision in this cause (68a), held that an order of the special common pleas court overruling property owners' exceptions to the appraisal of benefits accruing to their properties is "final and incontestable," in the sense that they have no right to appeal therefrom (74a, 75a), whereas it further held that the District itself, acting through its board of directors, has a

statutory right (Ohio General Code Sec. 6602-70, p. 99a) of appeal from such an order. (77a) By thus construing the Sanitary District Act, the Ohio Supreme Court denied to petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

While reasonable classification is permitted without doing violence to the equal-protection-of-the-laws doctrine, "such classification must be based on some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which classification is imposed; and classification cannot be arbitrarily made without any substantial basis." **Southern Railway Company v. Greene,** 216 US 400, 417, 54 L ed 536, 541, 30 S Ct 287, 291 (1910). The Ohio Supreme Court, in stating the basis of its decision, did not claim that any classification existed which might excuse the statutory discrimination between the board of directors and the property owners within the District. Nor can any such classification be supported. To illustrate, a statute permitting public utilities to appeal condemnation awards which are conclusively binding upon the persons whose lands are affected would surely be stricken down as flaunting the constitutional prohibition against unequal protection of the laws. We submit that no sound distinction can be drawn between that situation and the one for which a review is sought here.

The question of the constitutionality of a unilateral right of appeal, whether on the basis of proper classification or otherwise, has never been decided by this court. This issue is squarely presented on the facts in this cause. In **Missouri v. Lewis,** 101 US 22, 31, 25 L ed 989, 992 (1880) this court pointed out, in discussing the equal-protection-of-the-laws clause of the Fourteenth Amendment, that "It means that no person or class of persons shall be denied the same

protection of the laws which is enjoyed by any other person or other classes in the same place and under like circumstances." Clear indication that any arbitrary discrimination between parties as to appeal is unconstitutional is also found in **Truax v. Corrigan**, 257 US 312, 66 L ed 254, 42 S Ct 124 (1921). That case cited with approval a decision of the Supreme Court of Illinois which struck down a statutory attempt to grant a unilateral right of appeal to the managers of a drainage district under facts almost identical with those presented here. **Funkhouser et al. v. Randolph et al.**, 287 Ill 94, 122 NE 144 (1919). The State of Wisconsin is the only other jurisdiction that petitioner has been able to discover whose highest court was faced with the direct question here presented. In **State ex rel. Owen v. Wisconsin-Minnesota Light and Power Company**, 165 Wis 430, 433, 162 NW 433, 434 (1917), the Supreme Court of Wisconsin held unconstitutional a statute granting a right of appeal from the orders of the railroad commission to certain public and semi-public bodies and parties but denying that right to all other parties adversely affected by the orders of the commission, saying:

> "Here the defendant is not only denied due process of law but it is denied the equal protection of the law inasmuch as the statute gives the right of appeal to certain specified parties and denys it to others without any apparent valid basis for such classification."

This language applies directly to the issue here presented. In both the Illinois and Wisconsin cases, the courts based their conclusions on a violation of the Federal Constitution.

Special circumstances may warrant granting a property owner or private person a right of appeal where the adversary party, a public body or public official, is denied such right, as the guarantees of the Fourteenth Amendment to

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the Constitution of the United States do not apply to public bodies or public officials. **Williams v. Baltimore**, 289 US 36, 77 L ed 1015, 53 S Ct 431 (1933). But no decision has been discovered where an appeal has been allowed to a public body or public official, but denied to a private person in a cause where their interests are adverse. Equality is not achieved in controversies between public authorities and private persons if the public authority may resort to the higher courts for redress of errors by the lower court, but the private person must accept as final the decision of the lower court.

Equal protection of the laws in the form of an equal right of appeal is particularly vital in this cause. The special common pleas court, which sits as the trial court, the board of directors, and the appraisers are all creatures of the Sanitary District Act and their activities and relationships to each other form a closed circle. Upon organization of the district, the court appoints the board of directors (Ohio General Code Sec. 6602-41, p. 94a), and, upon the recommendation of the board of directors, the court also appoints the appraisers. (Ohio General Code Sec. 6602-58, p. 95a) When the board of directors initiates any plan for an improvement of the district, the court, after approving the plan, instructs the appraisers to appraise benefits to all lands within and without the district that will be affected by such improvement. (Ohio General Code Sec. 6602-58, p. 95a) In examining the report of these appraisers, the court is not limited to hearing exceptions by persons affected, and approving or disapproving such report, but is empowered to return the report to the appraisers for revision with specific instructions as to the nature of the changes to be made. (Ohio General Code Sec. 6602-65, p. 97a) This peculiar nexus between the

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District officials and the trial court gives the District a distinct advantage before that court, and if the District is also granted the exclusive right of appeal therefrom, such favored treatment will not only be a denial of petitioner's constitutional rights, but the District will have achieved a truly despotic control over the property and persons of the property owners in the District.

The second federal question which petitioner seeks to have reviewed is whether a public authority may levy special assessments for the entire cost of a public improvement against only part of the lands which will benefit therefrom. As a result of the decisions of the state courts, the property owners of the cities of Youngstown and Niles, of whom petitioner is one, are about to be assessed for the entire $6,000,000 cost (3a) of additional water facilities which will largely benefit lands valued at more than $70,000,000 (93a) that are not to be subjected to any assessment whatsoever.

The Sanitary District Act of Ohio anticipated the extension of the benefits of sanitary districts to areas not within such districts originally. It specifically requires that all lands benefited in any way by construction of new improvements, whether within or without the district, be appraised on the basis of such benefits so that they may bear their fair proportionate shares of the cost of any new improvement. (Ohio General Code Sec. 6602-60, p. 96a) In spite of this clear statutory mandate, the trial court upheld the appraisers' action in refusing to appraise the benefits accruing to the lands outside the District and appraising the "benefits" accruing to lands within the District on a wholly fictitious basis, with the result that a part of the benefited lands will be assessed for the entire cost of the proposed improvement. The court, in its opinion (19a), like the

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appraisers in their report (2a), acknowledged that the outside area would be benefited, but it was not thereby deterred from approving the violation by its appointees of a clear statutory directive in making such appraisal.

The situation here presented is not unlike those wherein public authorities, for the purpose of taxation, have fully valued certain properties and intentionally and systematically undervalued other properties. It is an established rule of law that such intentional undervaluing of certain properties constitutes a denial of equal protection of the laws to those persons owning properties which have been fully valued. In **Sunday Lake Iron Company v. Wakefield,** 247 US 350, 352, 62 L ed 1154, 1155, 38 S Ct 495 (1918) the court said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination whether occasioned by express terms of the statute or by its improper execution to duly constituted agents and it must be regarded as settled that intentional systematic undervaluation by state officials of one taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

Again, in the case of **Sioux City Bridge Company v. Dakota County,** 260 US 441, 67 L ed 340, 43 S Ct 190 (1923) it was held that a bridge company had been the victim of unlawful discrimination when its property was assessed at its full valuation while other county property was assessed at only a fraction of its value.

If such undervaluation of property constitutes unfair discrimination in violation of the equal-protection-of-the-laws doctrine of the Constitution, an **a fortiorari** violation exists where a sanitary district court permits and, in fact,

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actively assists public officials to levy upon certain properties the entire burden of paying for additional water facilities and to relieve from assessment certain other properties which will clearly be benefited by such facilities.

Further, it is submitted that the assessment of the entire cost of a public improvement against only part of the area benefited and required by statute to be assessed is a violation of the due process clause of the Fourteenth Amendment. Such action is in direct violation of the rule laid down by this court in **Norwood v. Baker**, 172 US 269, 43 L ed 443, 19 S Ct 187 (1898), which held that exaction from the owner of private property of the cost of a public improvement in excess of the special benefits accruing therefrom to such owner, is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation. A case even closer to the factual situation herein presented is **Myles Salt Company v. Board of Commissioners of the Iberia and St. Mary Drainage District**, 239 US 478, 485, 60 L ed 392, 396, 36 S Ct 204, 206 (1916), in which this honorable court held that "a drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefits to other property, there is an abuse of power and an act of confiscation." We submit that the actions and the apparent motives of the drainage district in that case and of the Sanitary District here are essentially the same, and that such actions result in both cases in an unconstitutional confiscation of property.

This court has clearly stated in the above-cited cases that assessments levied upon property to pay for improvements

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that cannot benefit such property, or assessments in excess of the benefits accruing to such property by reason of such improvements, are violations of the Fourteenth Amendment to the Constitution. We submit that by the same reasoning, the action of the District in levying assessments upon certain benefited properties in an amount greatly in excess of the benefits accruing to such property, and equal to the entire cost of the proposed improvement, while relieving other benefited properties from any assessment, is discriminatory and confiscatory with reference to the properties assessed, and is a violation of the Fourteenth Amendment to the Constitution.

This cause marks the first of what may well be a number of improvements to the Mahoning Valley Sanitary District facilities in keeping with the growth of population and industry in northeastern Ohio. (24a, 25a) Unless this honorable court grants relief from this unconstitutional tax burden, the owners of property within the District, being without any control over the officers or activities of the District, will be exposed to assessment for the entire costs of all future improvements despite the absence of any benefit to their properties.

When the appellate courts of Ohio denied petitioner the right to appeal from the decision of the trial court which will result in the assessment of petitioner's property at a rate out of all proportion to the benefits to be received, petitioner was left without means of securing a review of this unconstitutional taking and has been forced to come before this honorable court for protection of its rights. As indicated by the above-cited cases, this honorable court has been vigilant in upholding the constitutional principle that special assessments on private property for the pur-

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pose of meeting the cost of public improvements are enforceable only to the extent that the property on which such assessment is levied is specially benefited. We respectfully submit that the action of the Mahoning Valley Sanitary District in this cause violates that principle by assessing petitioner and all other owners of property within the District for the entire cost of a public improvement which will not and is not intended to materially benefit such properties. We pray that this honorable court hear this cause in order to protect the owners of such properties from this infringement of those rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION.

This case is a portrayal of the obstacles encountered by petitioner, a private property owner, in attempting to force a great public authority to comply with the law governing its existence, and to recognize the rights guaranteed by the Constitution of the United States to private property owners. The obstacles increase where, as in this case, the trial court to which petitioner must apply for protection from the unconstitutional acts of the public authority, appoints and supervises the conduct of the officials in charge of the public authority. The trial court, in approving the taking from petitioner of its property for a public purpose without just compensation and denying to it the equal protection of the laws, has grievously wronged petitioner and other property owners in the cities of Youngstown and Niles. The state appellate courts, in forbidding to petitioner any right to appeal from the decision of the trial court, while granting to the public authority an unrestricted

right of appeal, have denied petitioner and like property owners the vital right to stand before the law on an equal footing with their adversary—the public authority.

For these reasons, petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES E. MITCHELL,
Counsel of Record for Petitioner.

Of Counsel:
FRANK C. DUNBAR, JR.